IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATHEW COLLETT, Appellant.	No. 33714-2-II UNPUBLISHED OPINION

Van Deren, J. – Mathew Collett appeals his resentencing on convictions of first degree burglary, first degree robbery, second degree assault, theft of a firearm, and first degree unlawful possession of a firearm. Collett contends that the provision in his sentence requiring him to submit a biological sample for deoxyribonucleic acid (DNA) identification analysis is unconstitutional and that the trial court erred in concluding that his burglary and theft convictions counted as separate offenses after finding during his original sentencing that they counted as one offense under the same criminal conduct rule. We affirm.

FACTS

Collett pleaded guilty on April 8, 2002, to an amended information charging first degree burglary, first degree robbery, second degree assault, theft of a firearm, and first degree unlawful possession of a firearm. The trial court imposed the recommended sentence of 120 months and in doing so concluded that the burglary and theft counts constituted the same criminal conduct.

Collett then filed a CrR 7.8 motion arguing that all of his current offenses constituted the same criminal conduct and that the trial court had included washed out juvenile offenses in his offender score. His motion was transferred to us and consolidated with Collett's personal restraint petition, which raised the same issues. No. 29906-2-II. After we dismissed the petition, Collett sought review from the Washington Supreme Court. Our Supreme Court ultimately entered an order granting discretionary review and remanding for resentencing consistent with *In re Personal Restraint of LaChappelle*, 153 Wn.2d 1, 100 P.3d 805 (2004), dealing with previously "washed out" convictions under the 2000 amendments to the Sentencing Reform Act of 1981 (SRA), Chapter 9.94A RCW. 153 Wn.2d at 3-4.

Collett submitted a memorandum for the resentencing hearing that noted that the six juvenile offenses originally included in his offender score washed out under *LaChappelle.* He argued that the trial court had to determine which of his current offenses constituted the same criminal conduct and address the issue of merger because our Supreme Court recently held that first degree robbery and second degree assault merge under certain circumstances. *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005). Collett contended that his robbery and assault

convictions merged and, therefore, the burglary, robbery, assault, and theft convictions together counted as one offense under the same criminal conduct rule.

During the resentencing hearing, the State attempted to resurrect a firearm enhancement charged in the original information so that it could again recommend a sentence of 120 months. While conceding that the robbery and assault convictions merged under *Freeman*, the State urged the sentencing court to find that the remaining offenses counted separately. The State contended that the court had originally considered the burglary and theft counts as the same criminal conduct to satisfy the plea agreement, but that it could reconsider that decision. Collett responded that the same criminal conduct determination was the main issue to be resolved during resentencing. The court ultimately ruled that although the assault and robbery counts merged, the remaining offenses counted separately. It also rejected the State's proposed firearm enhancement.

The trial court imposed a sentence of 75 months and ordered Collett to have a biological sample collected for purposes of DNA analysis under RCW 43.43.754 (1999). Collett appeals.

Discussion

I.

Collett first challenges the sentencing provision requiring him to submit a biological sample for DNA analysis. He contends that this requirement constitutes an unlawful search under the Fourth Amendment of the federal constitution and article 1, section 7 of the state constitution.

This issue is governed by preexisting case law. RCW 43.43.754 requires an individual who has been found guilty of a felony to give a biological sample for DNA identification analysis.

Division One rejected the argument that this statute violates the Fourth Amendment and article 1, section 7 in *State v. Surge*, 122 Wn. App. 448, 94 P.3d 345 (2004), *review granted*, 153 Wn.2d 1008 (2005).[1] Although the Supreme Court has granted review in *Surge*, it upheld an earlier version of RCW 43.43.754 that was limited to those convicted of sexual or violent offenses. *State v. Olivas*, 122 Wn.2d 73, 856 P.2d 1076 (1993). Moreover, when the Ninth Circuit upheld the federal DNA collection statute, the United States Supreme Court denied certiorari. *United States v. Kincade*, 379 F.3d 813 (9th Cir. 2004), *cert. denied*, *Kincade v. United States,* 544 U.S. 924, (2005). In light of this precedent, Collett's constitutional challenge to RCW 43.43.754 fails.

II.

Collett argues next that the trial court was precluded from scoring his burglary and theft convictions separately during resentencing when it originally scored them as one offense.

A defendant's current offenses count separately in determining the offender score unless the trial court finds that some of them encompass the same criminal conduct. Former RCW 9.94A.400(1)(a) (1999).[2] Offenses encompass the same criminal conduct if they require the same criminal intent, are committed at the same place and time, and involve the same victim. Former RCW 9.94A.400(1)(a); *State v. Williams*, 135 Wn.2d 365, 367, 957 P.2d 216 (1998).

The inquiry regarding intent focuses on the defendant's objective criminal purpose and may include a consideration of whether one crime furthered the other, whether the crimes were

[1] *Surge* was argued in the Washington Supreme Court on May 26, 2005.

[2] This statute was re-codified as RCW 9.94A.589 in 2001, but we use the citation in effect when Collett committed his offenses in 2000.

part of the same scheme or plan, and whether the criminal objective changed. *State v. Davis*, 90 Wn. App. 776, 781-82, 954 P.2d 325 (1998); *State v. Calvert,* 79 Wn. App. 569, 578, 903 P.2d 1003 (1995). When a defendant commits other offenses during a burglary, the burglary anti-merger statute allows a trial court to impose separate punishments for each crime, even if the crimes constitute the same criminal conduct. RCW 9A.52.050; *Davis*, 90 Wn. App. at 784. A trial court's determination of whether two offenses involve the same criminal conduct for sentencing purposes will not be disturbed on appeal unless there is clear abuse of discretion or misapplication of the law. *Calvert*, 79 Wn. App. at 577.

The trial court's initial conclusion that the burglary and theft convictions counted as one offense under the same criminal conduct rule was apparently part of its decision to impose the jointly recommended sentence of 120 months. When the Supreme Court remanded for resentencing consistent with *LaChappelle*, it did not refer to the same criminal conduct issue Collett raised in his personal restraint petition. The memorandum that Collett filed on remand, however, invited the trial court to revisit this issue. While acknowledging that the court had already concluded that his burglary and theft offenses were the same criminal conduct, Collett encouraged the trial court to conclude that all of his current offenses, except for the unlawful firearm possession, counted as one offense under the same criminal conduct rule.[3]

Collett now contends that the reconsideration he invited was inappropriate under the law of the case doctrine and collateral estoppel, but we find neither principle applicable under these

[3] The unlawful possession of a firearm conviction counted separately because its victim was the general public. *See State v. Haddock*, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000).

circumstances. Collateral estoppel precludes the same parties from relitigating issues actually raised and resolved by a former verdict and judgment. *State v. Williams, 132* Wn.2d 248, 253-54, 937 P.2d 1052 (1997). Because Collett's original sentence no longer exists as a final judgment on the merits, collateral estoppel does not apply. *See State v. Harrison*, 148 Wn.2d 550, 561, 61 P.3d 1104 (2003) (holding that collateral estoppel did not prevent trial court from reconsidering its earlier decision to impose an exceptional sentence following a remand for resentencing). The law of the case doctrine does not apply because the same criminal conduct issue was never before litigated. *See Harrison*, 148 Wn.2d at 562-63 (because merits of exceptional sentence were not at issue in the prior appeals, the concerns of finality and efficiency addressed by the doctrine did not bar reconsideration of such a sentence).

The fact that the trial court accepted Collett's invitation to reconsider its same criminal conduct determination, but did not resolve it in his favor, should not now be considered error. Even without Collett's invitation, the court was entitled to reconsider its earlier same criminal conduct ruling on the burglary and theft counts. On remand, a trial court may exercise its independent judgment to reconsider a previously unchallenged decision. *Barberio*, 121 Wn.2d at 50-51.

Collett attempts to distinguish *Barberio* by arguing that there is no indication that the trial court exercised its judgment and ruled again on the same criminal conduct issue, but the record indicates otherwise. Collett introduced the topic on remand and argued that the same criminal conduct determination was the main issue to be resolved at his resentencing. The State conceded

that the robbery and assault convictions merged but argued that the remaining convictions counted separately under the burglary anti-merger statute or because they were not the same criminal conduct. The court accepted the State's concession and added, "I'm not making a finding that any of the other crimes constitute the same criminal conduct. I'm not sure the intent is the same based on the record." Report of Proceedings (August 17, 2005) at 14.

The court's conclusion that the convictions were separate because they involved different intent was apparently based on evidence showing that Collett and his co-defendants went to the victim's home to steal his marijuana and then also stole his handgun. We cannot say that the court either abused its discretion or misapplied the law in concluding that Collett's criminal intent changed after his unauthorized entry into the victim's residence. *See State v. Rodriguez*, 61 Wn. App. 812, 816, 812 P.2d 868 (1991) (if the facts are sufficient to support either finding, same criminal intent or not, this court defers to the trial court's determination of what constitutes the same criminal conduct).[4] The trial court did not err in treating the burglary and theft of a firearm counts as separate offenses.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

[4] Furthermore, the court's decision to count Collett's current offenses separately is sustainable under the burglary antimerger statute.

Van Deren, J.

We concur:

Houghton, J.

Quinn-Brintnall, C.J.